



**BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit in said cause of The Continental Supply Company, a corporation, (plaintiff-appellant) v. The Federal National Bank, Shawnee, Oklahoma (defendant-appellee), which petitioner here seeks to have reviewed, is not yet officially reported but appears on pages 210 to 225 of the transcript of the printed record filed herewith.

STATEMENT OF THE CASE

The essential facts of the case are fully stated in petitioner's petition for a writ of certiorari, and in the interest of brevity are not repeated here. Reference will be made to such facts, on points involved, in the course of the argument which follows:

SPECIFICATIONS OF ERRORS TO BE URGED

Petitioner says that the United States Circuit Court of Appeals for the Tenth Circuit has erred:

(1) In erroneously holding that a mortgage upon an interest in an oil and gas lease is not a chattel mortgage, contrary to applicable Oklahoma law.

(2) In erroneously holding contrary to Oklahoma law, that a mortgage upon personal property contained in an instrument relating to real estate is not a chattel mortgage.

(3) In failing to apply as the rule of decision herein, the comprehensive terms of a plain unambiguous statute of Oklahoma, same being Section 75, Title 46, Oklahoma Statutes Annotated 1941.

SUMMARY OF THE ARGUMENT

1.

Neither an oil and gas lease nor any interest therein is either real estate or real property in Oklahoma; they are personal property. Consequently, a mortgage upon an interest in an oil and gas lease can not be a real estate mortgage. A mortgage upon a lease or leasehold has been specifically held by the Oklahoma Supreme Court to be a chattel mortgage and not a real estate mortgage.

Widick v. Phillips Petroleum Co., 173 Okla. 325, 49 Pac. (2d) 135. As pointed out in this case the requirements of the recording act do not change the character of the leasehold. It remains personal property, notwithstanding the recording act. The decision in this case is contrary to the principles of *Widick v. Phillips Petroleum Co.*, *supra*.

II.

The mere fact that a chattel mortgage is contained in an instrument which is required, under Oklahoma law,

to be recorded as an instrument "relating to real estate" does not convert a chattel mortgage into a real estate mortgage and the instrument must also be recorded as a chattel mortgage to meet the requirements of Oklahoma law. The decision of the Circuit Court of Appeals in this case to the contrary is in conflict with the decision of the Supreme Court of Oklahoma, the Court of last resort in Oklahoma, in the case of *Abraham v. American National Bank*, 161 Okla. 87, 17 Pac. (2d) 480.

III.

The Oklahoma statute in question (Sec. 75, Title 46, Oklahoma Statutes Annotated 1941) applies to all chattel mortgages. Under Oklahoma law a chattel mortgage is a mortgage of personal property and such chattel mortgage may be included in a lease or other instrument affecting real estate or created by a separate instrument. The statute applies to all such chattel mortgages.

It is obvious that the purpose of the statute is to secure the priority of optional advances made upon the security of personal property and the classification of the statute rests upon the depreciable character and fluctuating value, the changing conditions and other elements inherent in the very nature of personal property. If any exception is created to the plain unambiguous terms of the statute it should be done by the Legislature or people of Oklahoma and not by judicial decree of a Federal Court.

ARGUMENT

I.

The Circuit Court of Appeals should have held that the Bank's mortgages were chattel mortgages. Clearly the mortgages were chattel mortgages in so far as they covered the oil and gas to be produced and the lease equipment. The mere fact that they also covered Marshall's interest in the Pensoneau and Whitehead leases does not prevent them from retaining their essential character of chattel mortgages under Oklahoma law. Oil and gas are personal property in Oklahoma.

Keystone Pipe and Supply Co. v. Crabtree, 174 Okla. 564, 50 Pac. (2d) 1086.

In *American National Bank of Wetumka v. Hightower*, 184 Okla. 294, 87 Pac. (2d) 311, the Oklahoma Supreme Court approved this definition of a chattel mortgage as:

"* * * a contract made by the owner by which specific personal property is hypothecated for the performance of an act without the necessity of a change of possession."

Section 51, Title 46, Oklahoma Statutes Annotated 1941, provides as follows:

"Form of chattel mortgage

"A mortgage of personal property may be made in substantially the following form:

"This mortgage, made the——day of——in the year —— by A. B. of ——, by occupation a ——, mortgagor, to C. D. of —— by occupation a ——

mortgagee, witnesseth. That the mortgagor mortgages to the Mortgagee (here described the property), as security for the payment to him of _____ dollars, on (or before) the — day of _____ in year—— with interest thereon (or security for the payment of a note or obligation describing it, etc.).”

An oil and gas leasehold interest in Oklahoma is personal property:

“A leasehold interest in the oil, gas and minerals in Oklahoma is personal property.”

—*Duff v. Keaton*, 33 Okla. 92, 124 Pac. 291.

In *State v. Shamblin*, 185 Okla. 127, 90 Pac. (2d) 1053, the Court said:

“It has been consistently held by this court that an oil and gas mining lease is not real property nor a freehold or corporeal interest therein, and that the execution of such a lease does not constitute a conveyance of lands, tenements, or other realty, or of a freehold or corporeal interest therein. * * * It has also been repeatedly and consistently held that such oil and gas mining leases are chattels real and are therefore personal property.”

An oil and gas lease is not real estate.

—*First National Bank of Healdton v. Dunlap*, 122 Okla. 288, 254 Pac. 729;

Pauline Oil & Gas Co. v. Fischer, 191 Okla. 346, 130 Pac. (2d) 305.

An oil and gas lease is not real property.

—*Clark v. Mercer Oil Co.*, 139 Okla. 48, 281 Pac. 283.

Consequently a mortgage upon an oil and gas lease can not be a real estate mortgage because the security is not real property or real estate but personal property. Furthermore in Oklahoma it has been held that a mortgage upon a lease or leasehold is a chattel mortgage or mortgage upon personal property and not a mortgage upon real estate. See exhaustive opinion in *Widick v. Phillips Petroleum Co.*, 173 Okla. 325, 49 Pac. (2d) 132. The requirements of the recording act do not change the essential character of the chattel mortgage. It remains a mortgage upon personal property and does not become a real estate mortgage. *Widick v. Phillips Petroleum Co.*, *supra*.

II.

The Circuit Court of Appeals found that a chattel mortgage may be included in a mixed mortgage or real estate mortgage; that a valid chattel mortgage may be given upon oil and gas to be produced; that insofar as the mortgages of the Bank are concerned, the parties intended to and did mortgage the oil and gas and that to this extent the mortgages of the Bank are chattel mortgages, but also held that because the liens of the Bank upon the oil and gas were contained in instruments required to be recorded as instruments relating to real estate, the liens in some way lost their characteristics as chattel mortgages and became real estate mortgages in toto and must be considered as such. This reasoning is contrary to the express

holding of the Supreme Court of Oklahoma in the case of *Abraham v. American National Bank*, 161 Okla. 87, 17 Pac. (2d) 480. In that case a chattel mortgage was contained in a written lease contract. The lease contract was an instrument affecting real estate and was recorded as such and it was urged that the record of the lease as an instrument relating to real estate was sufficient to impart notice as to the lien therein contained upon the personal property, and that it was unnecessary to record the instrument as a chattel mortgage. The Court held that it was necessary to record the instrument both as an instrument affecting real estate and as a mortgage of personal property, saying:

"In the instant case, the instrument was one affecting both real and personal property. It consisted in the main of an instrument conveying an interest in real estate, and it was therefore the duty of the clerk to record it as such. * * * Plaintiff had ample time after return of his lease contract, and prior to the execution of defendant's mortgage—to have filed the same as a chattel mortgage. He failed to do so. * * * The recording of the instrument here involved as one affecting real estate was insufficient to impart notice to third parties that plaintiff had a lien against the property."

It will thus be seen that the mere fact that an instrument containing a lien upon personal property is also an instrument affecting real estate and has been recorded as such does not change the character of the entire instrument into a real estate mortgage or dispense with the necessity of recording the lien on personal property as a

chattel mortgage. Furthermore a lien upon an oil and gas lease does not cover oil and gas when produced therefrom. *Stanolind Crude Oil Purchasing Co. v. Busey*, 185 Okla. 200, 90 Pac. (2d) 876. So that in this case the liens specifically provided for in the mortgages of the Bank upon the oil and gas when produced and upon the proceeds thereof, should be treated as chattel mortgages and the statute authorizing future advances by the holder of "any chattel mortgage" is applicable and controlling.

III.

The Oklahoma statute is plain and unambiguous. There is no room for statutory construction. The statute applies to "any chattel mortgage." The meaning of the statute is clear. The statute reads:

"Any chattel mortgage may secure future advances to be made by the mortgagee or assignee, at this or its option for any purpose, but not to exceed in the aggregate an amount stated in said mortgage; and all advances so made shall be secured by such mortgage equally, to the same extent and with the same priority, as the amount originally advanced on the security of such mortgage and such advances may be made and repaid and again made and the amount so stated shall be considered only as the total amount of such advances as may be outstanding at one time."

—Section 75, Title 46, Oklahoma Statutes Annotated 1941.

It is evident that the intent of the statute is to base the right to make future advances upon the character of

security covered by the mortgage. It was clearly the intent to create such right for the benefit of persons making loans upon personal property. The Legislature evidently intended to give the persons who loaned on personal property the right to make such advances as the mortgagee should deem necessary for the best interest of himself and the mortgagor during the continuance of their relationship without being confronted or embarrassed with the claims of junior lien holders; seeking to apply the principle of the Elmdorf-Anthony Case. The depreciable character, the fluctuating value, the changed conditions and other elements inherent in the very nature of personal property all are readily seen as concurring factors entering into the legislative policy of Oklahoma expressed in this statute. The statute was designed to extend relief to all mortgagees of personal property without regard to whether their liens were contained in mixed mortgages, lease contracts or instruments affecting real estate or in simple, uncomplicated chattel mortgages. Nowhere is there any evidence of an intent to deny the benefit of this statute to a mortgagee whose chattel mortgage is contained in a mixed mortgage or instrument affecting real estate or to grant it only to the holders of simple chattel mortgages recorded as such and unencumbered by any other covenants or contractual obligations.

It is respectfully submitted that the questions involved in this case have not been decided according to the law of Oklahoma although Federal jurisdiction herein rests exclusively upon diversity of citizenship and that this

Honorable Court should grant certiorari herein and affirm the judgment of the United States District Court for the Western District of Oklahoma.

Respectfully submitted,

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